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Supreme Court of the United States

OCTOBER TERM, 1970

No.

INTERNATIONAL UNION OF OPERATING ENGINEERS,
Petitioner,

v.

METROPOLITAN PAVING COMPANY, INC.,
GILL CONSTRUCTION COMPANY, and
TECON CORPORATION, formerly
joint venturers, doing business
as METROPOLITAN-GILL-TECON.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner, International Union of Operating Engineers, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on March 9, 1970.

OPINIONS BELOW

The Tenth Circuit's opinion is reported at 439 F.2d 300. The District Court did not enter an opinion. The Court

of Appeals' opinion is reprinted as Appendix A, pp. 1a-10a *infra,* and its order denying a petition for rehearing is reprinted as Appendix B, p. 11a *infra.* The jury verdicts are reprinted as Appendix C, pp. 12a-13a *infra,* and the District Court's judgment is reprinted as Appendix D, p. 14a *infra.*

JURISDICTION

The Court of Appeals' judgment was entered on March 9, 1971. A timely petition for rehearing was denied on April 8, 1971. This Court has jurisdiction under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether a "dispute between two or more groups of employees over which is entitled to do certain work for an employer" (*NLRB* v. *Radio and Television Broadcast Engineers Union (CBS),* 364 U.S. 573, 579) is an essential element of the unfair labor practice defined by § 8(b)(4)(D) of the Taft-Hartley Act.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended by the Taft-Hartley Act, 49 Stat. 449, 61 Stat. 136, 29 U.S.C. § 141 *et seq,* are reprinted as Appendix E, pp. 15a-17a *infra.*

STATEMENT OF THE CASE

1. The relevant background of the instant suit is fairly outlined in the lower court's opinion (Pet. App. 1a-2a):

"[Metropolitan-Gill-Tecon (MGT)] commenced this action for damages against the [International Union of Operating Engineers] alleging a violation of 29 U.S.C. § 187, and 29 U.S.C. § 158(b)(4). The case was tried to a jury which returned a verdict for [MGT] in the amount of $163,224.29. . . ."

"MGT [was] awarded a contract by the Cities of Aurora and Colorado Springs, Colorado, to lay approximately fifty miles of pipeline near Buena Vista, Colorado. Agreements were entered into by MGT and local affiliates of the four labor unions basic to that job—Teamsters, Laborers, Carpenters, and Operating Engineers."

"While the job was in progress, MGT acquired two Barbour-Greene archezodial trenching machines. Members of Local No. 9 of the Operating Engineers began operating the machines, but a disagreement arose at the outset as to whether or not MGT was required to provide, in addition, an oiler or apprentice operating engineer, from the Operators' Union, for each of these machines. MGT took the position that the agreement with the Engineers did not provide for such oilers and refused to assign them. However, MGT did assign to one machine an employee, a member of the Laborers Union, to assist one of the operators for a period of two weeks before the strike."[1]

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[1] The full step by step sequence of events was that the test operation of the Barbour-Greene machines commenced with an oiler member of the Operating Engineers' Union being assigned "under protest" (R. II-166-168). When two of the machines began regular operation a few months later, an "oiler" was assigned to one, and the other was operated without any helper. Shortly before the

> "In protest over the failure of MGT to assign an oiler from its local to these machines, Local No. 9 engaged in a strike from May 12 to June 2, 1965. . . ."
>
> "It is MGT's position that this strike had an 'object' precluded by 29 U.S.C. §158(b)(4)(D) because it was a strike for the purpose of forcing MGT to reassign work from the Laborers to the Operators, therefore presenting a jurisdictional dispute."

2. The lower court noted (Pet. App. 4a) that the question as to "whether there was a jurisdictional dispute" was "one of the central issues of the trial." And as it explicitly recognized, MGT's position on this issue was that the unfair labor practice defined by §8(b)(4)(D) of the Taft-Hartley Act reaches all strikes "for the purpose of forcing [an employer] to reassign work from [one union] to [another]" (Pet. App. 2a). The Union's position throughout, on the other hand, was that §8(b)(4)(D) applies "only to competing claims between rival groups of employees" (see p. 5, n. 3 *infra*) and that there was no claim to the work in question by the Laborers' Union.[2]

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strike MGT removed the oiler from one of the machines and assigned a laborer to set the guide "string line" for the other machine, but not to perform the other duties of an oiler. (R. II-235, 264-267, 275-277, III-445-446).

"R" references are to the 9 volume record appendix filed in the court below.

[2] In this regard Ted Jeznach, Business Manager of the Laborers' Council for Colorado and President of the Laborers' Local, testified that "there never was any question in our mind. It was the operating engineers work" and that any contention that the Laborers had claimed the work "would have been an outright lie" (R. VI-1108-

The Union twice moved for an instructed verdict on the ground that "there is no evidence that [it] entered into any jurisdictional dispute with contending union or employee or body of employees of MGT" (R. I-70-74), and also requested a jury instruction embodying its legal theory.[3] These motions and the requested instruction were denied (R. I-62, VI-1056, VII-1322). Instead, the District Court after a lengthy preliminary statement on jurisdictional dis-

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1111). This testimony confirms the objective facts. The record is bare of probative evidence of a Laborers' demand for, or contractual claim to, the work in question, or even of an insistance by that union that it retain the unsolicited reassignment of that work made by MGT.

[3] "While the statute does not define the term 'jurisdictional dispute' the law is clear that the statute is designed to apply only to competing claims between rival groups of employees. And the statute does not apply to disputes between a union and an employer where no such competing claims are involved. The statute does not apply when all that is shown is that an employer has elected to reallocate work among his employees. The statute is confined to disputes between rival groups of employees and not to disputes between an employer and a union as such.

"Accordingly, if the dispute which occasioned the work stoppage was between the employer, M-G-T and the Operating Engineers Union with respect to the employment of an oiler on the Barbour-Greene machine, there is no violation of the law.

"Unless you find from a preponderance of the evidence that there was a dispute between the Operating Engineers Union Local 9 on the one hand and the common laborers' union on the other, you must find for the defendant with respect to the May 12-June 2, 1965 strike." (R. I-61-62).

putes[4] explicitly charged the jury as follows (R. I-98-99):

> "The issues and matters to be determined by the jury in this case are as follows:
>
> * * *
>
> "Second: Did the [Union] induce or encourage [MGT's] employees to cease work or to refuse to perform work for [MGT] with the object or purpose or intent to require or for the purpose of requiring [MGT] to reassign work theretofore assigned to one or more labor unions to other or different labor unions:
>
> "If your unanimous answer to the foregoing question (2) is 'NO,' you should return a verdict in favor of the [Union]; but if your unanimous answer is 'YES,' you then have a third question to determine. . . ."

The Union's objection to the charge as it related to ". . . jurisdictional strikes, because the instruction fails to

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[4] "The plaintiff alleges that the defendant engaged in a jurisdictional strike. You are instructed that a jurisdictional strike is a strike, one purpose or object of which is to force or require an employer to reassign particular work from one labor union to another labor union. The essence of a jurisdictional strike is a dispute between two labor unions for the work. The fact that one labor union holds the contested jobs or has the work and holds on in a polite, non-belligerent manner, while the other labor union uses a work stoppage or a strike in an effort to get the jobs or the work, or to get some of the jobs or part of the work, does not mean that a jurisdictional dispute is not present. When one labor union insists that work, for which another labor union has contracted and is being paid, be assigned to it, a jurisdictional dispute exists. A jurisdictional dispute concerns separate crafts of workers and a dispute solely between an employer and union is not a jurisdictional dispute.

"In this connection you are further instructed that in the enact-

limit the jury in its consideration to the existence of a[n] existing active dispute resulting from the contentions of two contesting groups of employees or labor organizations . . .'' was overruled (R.VII-1347).

On appeal the court below, in affirming the verdict against the Union, held (Pet. App. 4a): first, that ''the instructions given by the trial court on this issue are accurate statements of the law,'' and second, that taking the law as stated in those instructions ''there was sufficient evidence to support the [jury's] determination.''

REASONS FOR GRANTING THE WRIT

The instant case presents the root question of the law regulating jurisdictional disputes—whether the existence of competing claims for work is an essential element of the unfair labor practice defined in § 8(b)(4)(D) of the Taft-Hartley Act.[5] This Court has already granted cer-

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ment of the Labor Management Relations Act of 1947, as amended, the Congress regarded jurisdictional disputes as a great evil, was determined to do all that was possible to cure that evil and that the right given to one injured in his property or business by a jurisdictional dispute to sue for the recovery of the damages sustained thereby was intentional and for the purpose of minimizing jurisdictional strikes.'' (R. I-91-92).

[5] The suit here took the form of a damage action in federal court under § 303, not an administrative proceeding before the National Labor Relations Board under § 10. This Court has noted that absolute ''substantive symmetry'' between the Board and court law of jurisdictional disputes is not required. *NLRB* v. *Radio and Television Broadcast Engineers Union (CBS)*, 364 U.S. 573, 584-585.

tiorari to consider a related, and indeed more limited, question of jurisdictional dispute law—whether notwithstanding an agreement between the contending employee groups to settle a dispute through a method of voluntary adjustment, the National Labor Relations Board has the power, at the behest of an employer, to issue a § 10(k) determination. *NLRB* v. *Plasterers Local Union No. 79, Texas State Tile & Terrazzo Co., et al* v. *Plasterers Local Union No. 79,* Nos. 1184 & 1231, October Term, 1970.

The questions presented here and in *Plasterers* turn on the proper application of the basic principles enunciated in *NLRB* v. *Radio and Television Broadcast Engineers Union (CBS),* 364 U.S. 573. This Petition should therefore be granted and set down for argument with Nos. 1184 & 1231 so that the Court will have before it all of the ramifications of the statutory issue which it has already agreed to consider. Moreover, the decision below is contrary to *CBS,* in direct conflict with the relevant Board law, and subverts the right of employees to protect their interests in the resolution of work assignment questions, which is protected by §§ 7, 8(d) and 13 of the Act—as we now demonstrate.

However, § 303 reaches only that conduct "defined as an unfair labor practice in section 8(b)(4)." Since the instant case turns on the definition of the unfair labor practice declared by § 8(b)(4)(D) the foregoing caveat in *CBS* is plainly inapplicable here. Compare *Painters District Council 38* v. *Edgewood Contracting Co.,* 416 F.2d 1081, 1083 (C.A. 5), see also *Paramount Transport Systems* v. *Local 150 Teamsters,* 436 F.2d 1064, 1065.

1. In *CBS,* this Court, in reversing the NLRB's method of making jurisdictional dispute determinations, stated that "a jurisdictional dispute under § 8(b)(4)(D) . . . is a dispute between two or more groups of employees over which is entitled to do certain work for an employer" (364 U.S. at 579). And *National Woodwork Mfrs. Asso.* v. *NLRB,* 386 U.S. 612, 625 emphasizes the principle, inherent in *CBS,* that the unfair labor practice defined in § 8(b)(4)(D), like the other union activities interdicted by the remaining subsections of § 8(b)(4), is "limited to protecting employers in the position of neutrals between contending parties" since "the prohibition of subsection (D) against coercion to force an employer to assign certain work to one of two unions contesting for it protects the employer trapped between the two claims."

After *CBS,* the NLRB, without reconciling its prior practice with that decision, continued to make jurisdictional determinations in cases in which the two unions involved, but not the employer, had agreed upon a voluntary method of adjusting the dispute. In *Plasterers Local Union No. 79* v. *NLRB,* ____ F.2d ____, 74 LRRM 2575, *certiorari granted,* ____ U.S. ____ (Nos. 1184 & 1231, October Term 1970) the District of Columbia Circuit overturned this practice on the ground that is was inconsistent with the construction of § 8(b)(4)(D) announced in *CBS* and amplified in *National Woodwork.* Judge Leventhal noted (74 LRRM at 2584) that *CBS* establishes that § 8(b)(4)(D) protects only those employers "plagued by employee groups that do not agree," and not those who are

"dissatisfied with the way [the employee groups] do agree." For:

> "The Taft-Hartley Act, though broad and unqualified in its terms, must be taken in light of its dominant purpose to protect 'neutral' employers. This aspect of the 'common law' of labor relations has been infused into the meaning of the Act in cases involving the provisions of the law broadly prohibiting secondary boycotts. A similar principle is also applicable to ensure the kind of application of the jurisdictional dispute provisions that was intended by Congress." (74 LRRM at 2584-2585, Footnote omitted).

The holding of the court below, that the unfair labor practice defined by § 8(b)(4)(D) reaches all strikes "for the purpose of requiring [an employer] to reassign work theretofore assigned to members of another union," (pp. 5-7 *supra*) stems from exactly the error isolated and described in *Plasterers*—the failure to recognize that the "dominant purpose [of § 8(b)(4)] is to protect 'neutral' employers" (74 LRRM at 2584), and that the essential prerequisite for the conclusion that § 8(b)(4)(D) has been violated is a finding that the strike grew out of "a dispute between two or more groups of employees over which is entitled to do certain work for an employer" (*CBS*, 364 U.S. at 579).

Indeed, the lower court's construction of the Act is so plainly contrary to *CBS* that even the NLRB has recognized the inconsistency. Prior to *CBS* the Board had embraced the position taken below. At that time it:

> "construed § 8(b)(4)(D) to mean 'that an employer is

> free to make work assignments without being subject to strike pressure by a labor organization seeking the work for its members'. . . . Needless to say, assertion of competing claims by rival groups of employees was unnecessary for an unfair labor practice determination under § 8(b)(4)(D) . . . since the emphasis upon the employer's prerogatives over work assignments rendered such a factor irrelevant." *Penello* v. *Local Union No. 59 Sheet Metal Workers,* 195 F.Supp. 458, 464-465 (D. Del.).

In *Sheet Metal Workers,* Judge Caleb Wright concluded that the rationale of *CBS* undermines the theory that § 8 (b)(4)(D) protects employers from all economic pressure designed to secure a work assignment, and held that this Court's opinion therein:

> "compels the conclusion that § 8(b)(4)(D) proscribes coercive economic activity only when it is employed as a means of resolving an active dispute between rival groups of employees which have asserted competing claims for particular work." (195 F.Supp. at 465).

Prodded by Judge Wright's "painstaking analysis," the NLRB acknowledged the compulsion of *CBS,* reversed its prior position, and adopted the holding of *Sheet Metal Workers. Local 107 Teamsters (Safeway Stores),* 134 NLRB 1320. Thus, the Board in its brief to this Court in *Plasterers,* citing its "*Safeway* doctrine," explicitly recognizes that "by definition a [jurisdictional] dispute cannot exist unless there are rival claims to the work." NLRB Brief in Nos. 1184 & 1231, October Term, 1970, p. 30, n 23.

2. It was early recognized that the secondary boycott provision, § 8(b)(4)(B), "could not be literally construed; otherwise, it would ban most strikes historically considered to be lawful . . ." *Local 761, IUE* v. *NLRB (General Electric)*, 366 U.S. 667, 672. The decision below, nevertheless, accords the proscription of § 8(b)(4)(D) the widest scope its language will bear. The result here, as in the secondary boycott context, is to extend § 8(b)(4) beyond the limits of the precise evil Congress intended to abate into the area of "strikes historically considered to be lawful."

The instant case grows out of a run of the mine "manning" dispute in which the Union contended that the Company's Barbour-Greene archezodial trenching machines should have been manned by an operator and a full-time helper trained to aid the operator in every facet of the work, while the Company took the position that the operator should either work alone or with the part-time assistance of an unskilled worker, pp. 3-4 *supra*. Such worker assignment or "manning" questions, which arise daily in every industry, are at the heart of the mandatory subjects of bargaining. See *Railroad Telegraphers* v. *Chicago & N.W. R. Co.*, 362 U.S. 330, *Fibreboard Paper Products Corp.* v. *NLRB*, 379 U.S. 203. The right to bargain over wage rates, hours of work, etc. is meaningless absent the right to bargain over matters directly affecting the unit employees' job security. The agreement reached would be ephemeral since the standards set could be undercut at any time by employer transfers of traditional unit work to other employees. And it is difficult to conceive of decisions more directly affecting

job security, and outside the "core of entrepreneurial control" (*Fibreboard*, 379 U.S. at 223, Stewart J. concurring), than determinations as to the number and identity of the employees who are to do a particular job.

The expansive reading of § 8(b)(4)(D) adopted below compels the conclusion that a strike to protest the fact that "the employer by his unilateral action [has] *created* the dispute, by transferring work away from the only group claiming the work, is an unfair labor practice." *Safeway Stores*, 134 NLRB at 1323 (emphasis in the original). This transforms that provision from a shield to protect employers caught between competing employee groups into a sword which employers can use to undercut their employees' terms and conditions of employment without fear of a riposte. For it provides employers with a ready method of precluding union self help in regard to work assignment questions. All that is necessary is that when group A raises a "manning" question, the employer assigns some portion of the work to group B even though the latter has not sought the work and is willing to have group A do it. Then, if group A responds by utilizing economic force the employer counters by filing a § 8(b)(4)(D) charge and a § 303 damage suit.

This result is, of course, directly contrary to the basic principle that management and labor are to reach their own agreements on the subjects encompassed by § 8(d) through free "collective bargaining with the right to strike at its core" (*Bus Employees* v. *Missouri*, 374 U.S. 74, 82) since the Act "does not attempt to control the results of

negotiation." *NLRB* v. *Insurance Agents International,* 361 U.S. 477, 488. Precisely because "the use of economic pressure" is so clearly "part and parcel of the process of collective bargaining," (361 U.S. at 495) the right to strike is protected by §§ 7 and 13 of the Act and:

> "in the absence of clear indicia of congressional intent to the contrary, these provisions caution against reading statutory prohibitions as embracing employee activities to pressure their own employers into improving the employees' wages, hours, and working conditions." *National Woodwork,* 386 U.S. at 643.

There are no "clear indicia of a congressional intent" to suppress the right to strike to protest an employer's work assignment determinations in the absence of a competing claim to that work. The relevant legislative history is set out in *CBS* and it establishes that Congress merely wished to protect employers who are "the helpless victims of quarrels that do not concern them at all" (364 U.S. at 581 quoting H.R. Rep. No. 245, 80th Cong. 1st Sess. p. 21). Compare, *Sheet Metal Workers,* 195 F.Supp. at 469-471. There is nothing in that history demonstrating a desire to restrict collective bargaining on "manning" questions. To the contrary, the sole object pursued in § 8(b)(4)(D) was to perfect the bargaining process as it relates to work assignment disputes. This was done by providing a statutory solution for a problem that collective bargaining cannot solve—the alleviation of the situation of an employer caught "between the devil and the deep blue" (*CBS,* 364 U.S. at 575).

3. In sum: The NLRB has recognized that *CBS* undermines the theory that § 8(b)(4)(D) protects employers from

all economic pressure designed to secure a work assignment, and that the rationale of this Court's opinion therein compels the conclusion that the Act proscribes only those strikes which grow out of "a dispute between two or more groups of employees over which is entitled to do certain work for an employer" (364 U.S. at 579). The Tenth Circuit, and the Eighth Circuit (see *Local 978 Carpenters* v. *Markwell,* 305 F.2d 38, 47), without reference to either *CBS* or the relevant Board law, continue to cling to the pre-CBS view that employers have an absolute right to make work assignments free of economic pressure. That position, which is bereft of support in the congressional intent underlying §§ 8(b)(4)(D) & 303, insulates an important class of everyday employer decisions which have a direct and immediate impact on job security from effective employee response, and is entirely inconsistent with the Act's mandate for free "collective bargaining with the right to strike at its core" (*Bus Employees* v. *Missouri,* 374 U.S. 74, 82) over all mandatory bargaining subjects. Finally, the error committed below is even more fundamental than that committed by the NLRB in *Plasterers.* For that case involves situations in which there are competing claims for the work and as to which it is undisputed that § 8(b)(4)(D) applies initially. The only question there is whether a subsequent voluntary settlement of the dispute by the competing employee groups precludes a § 10(k) determination by the Board. Here, on the other hand, the decision below sweeps into § 8(b)(4)(D) a class of cases in which the employer has no basis whatsoever for securing government protection since the union's activity is protected by §§ 7 & 13 from the out-

set. Given the substantial nature of the question presented and the pendency of *Plasterers*, the propriety of a grant of certiorari in the instant case is, we submit, manifest.

CONCLUSION

For the above stated reasons this Petition for a Writ of Certiorari should be granted.

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APPENDIX A

[Caption omitted]

Before PICKETT, HILL, and SETH, Circuit Judges.

SETH, Circuit Judge.

The appellees-employers commenced this action for damages against the appellant International Union, alleging a violation of 29 U.S.C. § 187, and 29 U.S.C. § 158(b)(4). The case was tried to a jury which returned a verdict for plaintiffs in the amount of $163,224.29.

The defendant union has appealed asserting lack of jurisdiction, several procedural errors, errors in instructions, and insufficient evidence to support the verdict. The plaintiffs took a cross-appeal, in which they argue that the verdict was not based upon the proper theory and was grossly inadequate.

Plaintiffs-appellees-cross-appellants, Metropolitan Paving Company, Inc., Gill Construction Company, and Tecon Corporation, formerly joint venturers doing business as Metropolitan-Gill-Tecon (MGT), were awarded a contract by the Cities of Aurora and Colorado Springs, Colorado, to lay approximately fifty miles of pipeline near Buena Vista, Colorado. Agreements were entered into by MGT and local affiliates of the four labor unions basic to that job—Teamsters, Laborers, Carpenters, and Operating Engineers.

While the job was in progress, MGT acquired two Barbour-Greene archezodial trenching machines. Members of Local No. 9 of the Operating Engineers began operating the machines, but a disagreement arose at the outset as to whether or not MGT was required to provide, in addition, an oiler or apprentice operating engineer, from the Operators' Union, for each of these machines. MGT took the position that the agreement with the Engineers did not provide

for such oilers and refused to assign them. However, MGT did assign to one machine an employee, a member of the Laborers Union, to assist one of the operators for a period of two weeks before the strike.

In protest over the failure of MGT to assign an oiler from its local to these machines, Local No. 9 engaged in a strike from May 12 to June 2, 1965. During that strike the defendant International Union sent its representative, W. E. Magruder, to the jobsite to investigate and attempt to arrange some solution to the dispute. He attended several meetings with members of Local 9 as well as with representatives of both the Union and MGT during the course of the strike. The parties here sharply dispute the nature of Mr. Magruder's role in the strike. Appellant contends that at all times Mr. Magruder was trying to get the men of Local 9 back on the job. Appellees disagree and predicate the liability of International primarily on the ground that Mr. Magruder actually induced or encouraged the strike or its continuation.

It is MGT's position that this strike had an "object" precluded by 29 U.S.C. § 158(b)(4)(D) because it was a strike for the purpose of forcing MGT to reassign work from the Laborers to the Operators, therefore presenting a jurisdictional dispute. MGT contends that it suffered considerable damage because of this strike, and in its cross-appeal urges that the jury was improperly constituted and awarded grossly inadequate damages. Appellees, therefore, request a new trial on the issue of damages alone, while appellant seeks a new trial on all issues as well as a dismissal for lack of federal jurisdiction.

Initially, we must consider appellant's claim that this action should be dismissed for lack of federal jurisdiction. The complaint in this action is based on 29 U.S.C. § 187, the jurisdictional counterpart of 29 U.S.C. § 158(b)(4). Appellant, however, contends that since the complaint alleges

a conspiracy between International and Local 9, it does not state a claim under 29 U.S.C. § 158(b)(4).

The statute allegedly violated by International does not, by its terms, proscribe conspiracy. Appellant's argument is that the complaint does not as the statute requires allege that International "engaged in," "induced," or "encouraged" the strike. The illegal acts alleged in the complaint are said to have been in furtherance of a conspiracy; however, specific acts were alleged to have been performed by International which the statute prohibits. The allegation of conspiracy under these circumstances is surplusage. Whether or not the plaintiffs are able to show that the defendant engaged in specific acts in violation of the statute goes to the merits of the case, not to jurisdiction. A fair reading of the complaint indicates sufficient allegations of specific acts prohibited by the statute to bring the action within the jurisdiction of the federal court under 29 U.S.C. § 187. Further as to this point, the case was properly submitted to the jury.

Appellant also urges a jurisdictional defect based on the absence of proof that the industry here involved affects interstate commerce. It is not clear from the jurisdictional statute, 29 U.S.C. § 187, or the cases decided thereunder, at what point the question of "affecting commerce" is to be decided. At the trial of this matter, the question of "effect on commerce" was one of the elements of the plaintiffs' case submitted to the jury. In considering whether or not there is federal jurisdiction, however, the procedure is to look to the face of the complaint to see that all jurisdictional requirements have been alleged and that such allegations are not frivolous. Bell v. Hood, 327 U.S. 678 (1946). The complaint in this action alleges that the industry involved affects commerce in its utilization of equipment and machinery and otherwise, and this is sufficient for these purposes. See National Labor Relations Board v. Denver Building & Construction Trades Council, 341 U.S. 675

(1951). The jury finding of an "effect on interstate commerce" concerns plaintiffs' proof of essential elements for recovery under 29 U.S.C. § 158. We must conclude that this action was properly within the jurisdiction of the trial court.

Appellant raises two objections based on the requirements of the pertinent statute, 29 U.S.C. § 158(b)(4)(D). It contends that the employer here was not engaged in interstate commerce and that it was facing no jurisidctional dispute or that an object of the strike was at least in part an attempt to force an employer to reassign certain work. Both of these issues were submitted under suitable instructions to the jury. The jury found that the industry here was engaged in commerce and that the strike had a proscribed object. These facts and the dispute surrounding them were one of the central issues of the trial. The record shows that the matters were fully developed. There is a wide difference between the parties as to whether there was a jurisdictional dispute. The record however demonstrates that an employee of a union other than the Engineers Union was performing the duties as a helper to the operator of the trencher at the time the strike began and when the Engineers took the strike route to force the assignment of a member of their union to the position. The record also shows informal meetings between members of the Laborers Union and the Engineers Union over the position of the helper. In brief there was sufficient evidence to support the determination made by the jury on this issue. The record further shows that the instructions given by the trial court on this issue are accurate statements of the law. We find no error on this issue.

The evaluation of the activities of Mr. Magruder, the representative of appellant, as these acts related to the then state of affairs on the jobsite and at the union meetings was properly for the jury. There was testimony that Mr. Magruder had said at a union meeting that there would "have to" be an oiler on the trencher, and thereby to cause the

reassignment of a job. There was also testimony that he had told the leaders of the local to have a "good" strike if they were going to have one. This, and the related evidence including the beginning of threatened violence and the presence of weapons among the strikers at the site, was sufficient basis for the jury's action.

These are fundamental fact issues which again were properly resolved by the jury under proper instructions. Little more need be said under these circumstances.

Appellant has also challenged as improper the removal of one of the jurors and substitution of an alternate by the court just at the jury prepared to deliberate. The removal was based on a report from the bailiff that he had heard the juror in question remark that he did not want to be on the jury and that he had some fear for his job, since he was a union member. The juror was removed immediately by the court and the alternate juror replaced him. Appellant urges that the action of the court in summary fashion deprived it of a properly constituted jury. As appellant points out, the appellate courts have a responsibility to see that jury selection procedures are properly adhered to. Abbott v. Mines, 411 F.2d 353 (6th Cir. 1969). Furthermore, as noted in that case, the controlling issue is not whether a party was actually prejudiced by the resultant jury, but rather whether the adopted procedure tends to weaken the institution of a jury trial. Rule 47(b), Fed.R.Civ.P., provides that alternate jurors ". . . shall replace jurors who, prior to the time the jury retires to consider its verdict, become or are found to be unable or disqualified to perform their duties." Neither the rule nor the statutory provisions collected at 28 U.S.C.A. §§ 1861-1874 set out specific procedural guidelines for such cases. Thus the question is whether or not the trial judge's removal of the juror tended to undermine the constitution of the jury. We think it clearly did not. There was sufficient cause appearing for the action taken. In United States v. Chapman, 158 F.2d 417 (10th Cir. 1947), this court stated that ". . . an inter-

ested party to a lawsuit has no vested right in any particular juror. The right of challenge is the right to exclude incompetent jurors, not to include particular persons who may be competent." The record shows that this juror was removed because his reported remarks suggested a possible bias and an inability to objectively perform the duties required of him. We find no error.

Appellant argues further that a settlement agreement between the employer and Local 9, entered into on May 28, 1965, released the claim of the employer. The trial judge, confronted with this same argument, found that the settlement agreement was not intended to, and was not broad enough to be regarded as a complete release from liability for past damages. We agree with that finding. The obvious purpose of the agreement was to end the strike and settle the dispute over the hiring of oilers for the duration of the job. There is not the slightest hint that the employer intended by that agreement to waive or release any claims it might have as a result of the strike.

The appellees argue by their cross-appeal that the jury award of $163,244.29 does not represent nominal damages, but is so grossly inadequate that it should be set aside. The jury by special verdict showed the elements in the total award as follows:

"Labor costs	$ 14,521.99
Job overhead costs	2,178.30
Supervisory and Engineering	2,301.96
Protective and Guard Services	4,459.78
Rental Value of Equipment rendered idle	135,699.95
Taxes and Insurance	None
Profits Lost	4,062.31"

There was testimony by a witness for the appellees who was an accountant to show the rental value of equipment. This value was based by him on a rental table generally

used in Colorado at the time. His testimony covered all the equipment being used by appellees on the job. This testimony, the appellees here urge, was only to show the damages which occurred because the job, by reason of the strike delay, could not be finished before winter and had to be shut down until spring. The particular testimony as it appears in the record had reference to such a protracted delay, but it was nevertheless applicable to any delay by reason of the use of the standard tables. The jury did not agree that the protracted delay, if there was one, was caused by the strike, and apparently instead it assessed damages for some period of delay it found was caused by defendant. It is not necessary to demonstrate mathematically how the jury arrived at its verdict. The appellant says the figure was "out of thin air," while the appellees suggest that it may have been only for the actual days of the strike and this is not what appellees asked for. However, under the record the verdict was well within the testimony admitted and there is otherwise no reason to set it aside.

Appellant also urges that the District Court for the Westers District of Oklahoma erred in refusing to transfer this action to Colorado pursuant to 28 U.S.C. § 1404(a). In order to find error in the refusal to transfer, it must appear that there was a clear abuse of discretion by the trial judge. Texas Gulf Sulphur Co. v. Ritter, 371 F.2d 145 (10th Cir. 1967). There is no such abuse in this case. See also Headrick v. Atchison, T. & S. F. Ry. Co., 182 F.2d 305 (10th Cir. 1950). The judge evaluated the pros and cons and exercised his discretion.

As to the issue relating to the period of limitations, the events giving rise to this action occurred in May and June 1965. The orginal complaint was filed in the United States District Court on January 23, 1967. On January 25, 1967, service was made on Arland B. Canny, the Oklahoma City representative of defendant International. That summons referred to Canny as the defendant rather than Interna-

tional. The praecipe was correct as were other papers served with the summons. Defendant's motion to quash service was granted and plaintiffs were given leave to amend the summons. On June 2, 1969, the summons was amended and the trial began. The record shows that the original complaint, which correctly names the parties to this action, was also served on Canny on January 25, 1967.

Appellant thus argues that the trial court erred in allowing the summons to be amended on June 2, 1969, as above described. It is admitted that the court may allow such amendment pursuant to Rule 4(h), Fed.R.Civ.P., but it is urged that such amendments may only be allowed if no material prejudice results to the party against whom the process issued. In this case appellant maintains that the amendment in question, deemed by the trial judge to relate back to the original date of service, deprived it of the defense of the statute of limitations. Therefore, appellant argues that the amendment does not satisfy the requirements of harmlessness set forth in Rule 4(h).

As an additional issue there is present a dispute between the parties as to the applicable statute of limitations in this case. Jurisdiction in this case is based on 29 U.S.C. § 187, and the right sought to be enforced is thus a federally created right. In such cases, as opposed to another possible result in some diversity cases, the filing of the complaint commences the action and tolls the applicable statute of limitations. Ragan v. Merchants Transfer & Warehouse Co., 337 U.S. 530 (1949); Hoffman v. Halden, 268 F.2d 280 (9th Cir. 1959). The complaint in this case was not defective, it was filed on January 23, 1967, and served on January 25, 1967. There is no contention that defendant was in any way prejudiced by any lack of notice, if there was any.

The original plaintiff in this action was designated as Metropolitan-Gill-Tecon, a joint venture composed of Metropolitan Paving Company, Inc., Gill Construction Company, and Tecon Corporation. All participants in the joint

venture were corporations. On June 18, 1969, during the trial of this action, motion was made and granted for an order amending the complaint and all pleadings to show the corporations rather than the joint venture as parties plaintiff. It was further ordered that such amendment would relate back to the filing of the complaint in this action. In allowing this amendment, the court did not abuse the discretion implied in Rules 15(c) and 17(a), Fed.R.Civ.P. Since it was clear from the outset that the three corporations were the real parties in interest in this matter, there was no prejudice to the defendant in granting the motion to amend. The fact that an applicable statute of limitations may have run before the real parties were substituted is not significant where the change is merely formal and in no way alters the known facts and issues on which the action is based. Missouri, K. & T. Ry. v. Wulf, 226 U.S. 570 (1913); see also, Foman v. Davis, 371 U.S. 178 (1962).

The appellant raises an additional procedural problem which relates to the capacity of Tecon Corporation to bring and maintain this action in the United States District Court in Oklahoma as one of the parties. The effect of the amendment as to parties was to remove the joint venture as a party, leaving Tecon and the other two corporations as the parties-plaintiff which were the real plaintiffs from its inception. It is alleged by appellant that Tecon was precluded from instituting and maintaining this action because it lacked capacity to sue in the courts of Oklahoma. The force of this argument allegedly derives from Wilson v. Williams, 222 F.2d 692 (10th Cir. 1955). In Wilson, this court held that:

> "... [W]here a foreign corporation is thus barred from maintaining an action in the courts of a state until it has obtained a certificate of domestication, it cannot maintain an action in the United States Court within the state without having obtained such a certificate."

In support of that proposition we cited Woods v. Interstate Realty Co., 337 U.S. 535 (1949).

Admittedly, the broad language of the Wilson case does appear to cast doubt on the capacity of Tecon to maintain this action. Of course, it may be, as appellees argue, that the Oklahoma statute, 18 Okla. Stat. § 1.201, would not apply to Tecon on the ground that Tecon did not really transact business in Oklahoma subsequent to its withdrawal in 1965. The defect in appellant's argument, however, stems from an incorrect application of the rule in the Woods case. The holding in Woods was in a diversity action where it was held that if a State does not permit a suit on a non-federal claim, federal courts sitting in diversity cases will do likewise. In the case before us, however, where the right asserted is instead federally created, the Woods rule does not apply and the Oklahoma statute does not operate to bar such an action. Angel v. Bullington, 330 U.S. 183 (1947); Holmberg v. Armbrecht, 327 U.S. 392 (1946); Lyon v. Quality Courts United, 249 F.2d 790 (6th Cir. 1957); 3A Moore, Federal Practice, § 17.21 at 774 (2d ed. 1970). It should also be noted that R. V. McGinnis Theatres & Pay T.V., Inc. v. Video Independent Theatres, Inc., 386 F.2d 592 (10th Cir. 1967), is not contrary. In McGinnis the corporation involved was not merely without domestication, it had been dissolved in Oklahoma, the State where it had been organized. There is no contention in our case that Tecon has been dissolved by the State in which it was organized. Tecon, therefore, did not lack capacity to bring and maintain this action to enforce a federally created right in the United States District Court.

AFFIRMED.

Filed March 9, 1971

APPENDIX B

[Caption omitted]

Before PICKETT, HILL, and SETH, Circuit Judges.

Upon consideration of petition for rehearing it is ordered that said petition be and it is hereby denied.

Filed April 8, 1971

APPENDIX C

[Caption omitted]

VERDICT

METROPOLITAN PAVING CO., INC., a corporation, et al., Plaintiffs, v. THE INTERNATIONAL UNION OF OPERATING ENGINEERS, an unincorporated association, Defendant. No. 67-39-Civil.

We, the Jury, find in favor of the plaintiffs Metropolitan Paving Co., Inc., a corporation, Gill Construction Company, a corporation, and Tecon Corporation, a corporation, which companies formerly comprised a joint venture known as Metropolitan-Gill-Tecon and also sometimes referred to as M-G-T, and against the defendant The International Union of Operating Engineers, an unincorporated association, and fix the amount of plaintiffs' recovery at $163,224.29.

June 20, 1969. Kessler Dorman, Foreman
Filed June 20, 1969

SPECIAL VERDICT APPORTIONING DAMAGES

We the jury, having been heretofore empaneled and having returned a verdict in favor of the plaintiffs above named in the amount of $163,224.29, do now upon our oath as requested by the Court apportion those damages as follows:

MAY 12 to JUNE 2, 1965

Individual Items of Damage Sought	Amount Awarded by Jury, if any
Labor Cost	$ 14,521.99
Job Overhead Cost	$ 2,178.30
Cost of Supervisory and Engineering Personnel	$ 2,301.96

Cost of Protective and Guard Service	$ 4,459.78
Rental and Ownership Value of Equipment Rendered Idle	$135,699.95
Payroll Taxes and Insurance	$ —
Profits Lost	$ 4,062.31

WORK STOPPAGES IN JULY AND AUGUST

Individual Items of Damage Sought	Amount Awarded by Jury, if any
Labor Cost	$ 0
Job Overhead Cost	$ 0
Cost of Supervisory and Engineering Personnel	$ 0
Cost of Protective and Guard Service	$ 0
Rental and Ownership Value of Equipment Rendered Idle	$ 0
Payroll Taxes and Insurance	$ 0
Profits Lost	$ 0

DATED this 20th day of June, 1969.

Kessler Dorman, Foreman

Filed June 20, 1969.

APPENDIX D

[Caption omitted]

JUDGMENT ON GENERAL VERDICT FOR PLAINTIFFS

The above styled and numbered cause came on for trial on June 2, 1969. A jury was empaneled and sworn to try said action, and witnesses on the part of the plaintiffs and defendant were duly sworn and examined. The trial was continued from day to day until it was submitted for the jury's consideration on June 19, 1969. Thereafter, on the following day, said jury returned into Court with a verdict signed by its foreman as set forth in Exhibit "A" hereto.

Thereupon, the Court furnished the jury with a special verdict apportioning damages in the form attached hereto as Exhibit "B," with instructions to fill out same. After consideration thereof, the jury returned said Exhibit "B" into Court.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the plaintiffs have and recover from the defendant the sum of $163,224.29 with interest thereon at the rate of 10% per annum from the date hereof until paid, together with plaintiffs' costs in the amount of $1,132.91 incurred in this action. The objections of both parties hereto to the matter contained in this Judgment, the rulings of this Court with reference to the costs allowed herein, and the Order of this Court fixing interest on Judgment and denying plaintiffs' application for attorney's fees dated July 15, 1969, are noted, and exceptions are allowed.

Dated this 22nd day of September, 1969.

LUTHER B. EUBANKS
United States District Judge

Judgment entered in Civil Docket on Sept. 22, 1969.
ADELAIDE HOLSTON, *Deputy*

Filed September 22, 1969.

APPENDIX E

The relevant provisions of the National Labor Relations Act as amended by the Taft-Hartley Act are as follows:

"SEC. 7. Employees shall have the right to self-organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . ."

* * *

"SEC. 8(b). It shall be an unfair labor practice for a labor organization or its agents— . . .

"(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is: . . .

"(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:"

* * *

"SEC. 8(d) . . . to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder. . . ."

• • •

"SEC. 10(k) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(D) of section (8)(b), the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed."

• • •

"SEC. 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right."

• • •

"SEC. 303. (a) It shall be unlawful, for the purpose of this section only, in an industry or activity affecting commerce, for any labor practice in section 8(b)(4) of the National Labor Relations Act, as amended.

(b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) may sue therefore in any district court of the United States subject to the limitations and provisions of section 301 hereof without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit."